No. 84-6811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WARREN MCCLESKEY,

Petitioner,

v.

RALPH M. KEMP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Of Counsel:

AMY YOUNG, ESQ.
HURST HANNUM, ESQ.
STEVEN M. SCHNEEBAUM, ESQ.
INTERNATIONAL HUMAN RIGHTS LAW GROUP
Washington, D.C.

*RALPH G. STEINHARDT, ESQ.
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6055

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

MOTION OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 36.3 of the Rules of this Court, the International Human Rights Law Group moves for leave to file the attached brief *amicus curiae* in support of the petition for a writ of *certiorari*. The Law Group is a non-profit organization of international lawyers and scholars, which, through litigation, publication, and other public activism, seeks to promote respect for human rights norms in all nations, including the United States.

Amicus wishes to support the petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit on the grounds that that Court of Appeals has both "decided an important question of federal law which has not been, but should be settled by this Court" and "decided a federal question in a way in conflict with applicable decisions of this Court." Rule 17(c). In particular, *amicus* wishes to submit for this Court's consideration the argument that the *en banc* decision below approved an admittedly racially-discriminatory system for the imposition of the death penalty, which violates peremptory norms of international law. In failing to consider international law as a relevant source of the rule of decision, the Eleventh Circuit's decision violates the Supremacy Clause of the Constitution and applicable decisions of this Court. Alternatively the precise question of whether international human rights norms must inform interpretations of Constitutional text is a highly significant issue of federal law deserving authoritative resolution by this Court.

Amicus also brings a unique institutional perspective to these proceedings. Between 1980 and 1984, the Law Group sought to litigate the issues of race discrimination raised in

this case before the Inter-American Commission on Human Rights, an instrumentality of the Organization of American States. On October 3, 1984, the Commission held the Law Group's petition inadmissible on certain procedural grounds. The Government of the United States had requested such a disposition *inter alia* on the ground that domestic remedies had not been exhausted and in particular on the ground that the issues raised herein were appropriate for disposition in the first instance by this Court and U.S. courts generally.

Amicus is not aware of any presentation of these arguments to this Court in this case. Counsel for petitioner has consented to the filing of this brief. *Amicus* sought the consent of counsel for the respondent who declined to provide it, necessitating this motion.

Respectfully submitted,

RALPH G. STEINHARDT
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000

Counsel of Record for the
International Human Rights
Law Group

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-6811

WARREN MCCLESKEY,

Petitioner,

v.

RALPH M. KEMP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF AMICUS CURIAE OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS

The International Human Rights Law Group is a non-profit organization of international lawyers and scholars which seeks to promote the observance of international human rights norms by providing legal assistance and information to individuals and groups on a *pro bono* basis; repre-

senting clients in international forums; and participating *amicus curiae* in U.S. litigation involving international human rights norms.

In 1980, the Law Group petitioned the Inter-American Commission on Human Rights, an instrumentality of the Organization of American States, to declare that capital sentences in the United States are imposed in a racially discriminatory manner. In particular, the Law Group argued that the death penalty is imposed disproportionately on those defendants whose victims are white and that such discrimination based upon the race of the victim was in violation of treaties to which the United States is a party. After receiving statistical evidence similar and in some cases identical to that presented below by petitioner herein, the Commission held the Law Group's petition inadmissible on procedural grounds and effectively deferred the Law Group's international claims pending an authoritative disposition of the issue by American courts. The Law Group thus has a direct institutional stake in this Court's decision to review the *en banc* opinion of the Eleventh Circuit Court of Appeals and to resolve the issues raised by that decision.

SUMMARY OF ARGUMENT

This is not an ordinary capital case. *Amicus* appears for the purposes of (i) demonstrating the unique and fundamental significance of this case, as acknowledged by the United States in its submissions to the Inter-American Commission on Human Rights, and (ii) arguing that the Eleventh Circuit, in violation of the Supremacy Clause of the Constitution and applicable decisions of this Court, failed to consider international law as a pertinent source of the rule of decision. Under *The Paquete Habana*, 175 U.S. 677 (1900) and its progeny, each of Questions Presented 1 through 5 should have been considered in light of the peremptory norm of

international law condemning racial discrimination. It is submitted in fine that the *en banc* court's failure to construe the Georgia Death Penalty Statute consistently with binding international law is reversible error.

Although the international issues raised by *amicus* were neither presented to the courts below nor raised in the petition for certiorari, this Court has established that it has the power to consider relevant issues raised in a case "in the interests of justice," irrespective of whether those issues were previously raised, *Wood v. Georgia*, 450 U.S. 261, 265, n.5 (1981), and that the exercise of that power is especially appropriate in capital cases, *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

Amicus offers no opinion as to the circuit court's disposition of purely domestic issues of law, including its severe approach to admittedly valid statistical evidence in suits of this type.

ARGUMENT

I. As Suggested By The United States In Its Submissions To The Inter-American Commission On Human Rights, The Issues Raised By The Eleventh Circuit's Decision Are Uniquely Important Questions Of Federal Law Deserving Authoritative Resolution.

In his petition for *certiorari*, the petitioner portrays a myriad of important, indeed unprecedented federal issues raised by the *en banc* decision of the Eleventh Circuit. *Amicus* expresses no opinion as to these domestic issues but would demonstrate to this Court that the United States in parallel international proceedings has conceded the significance of the issues raised in this case.

On August 6, 1980, *amicus* submitted a petition to the Inter-American Commission on Human Rights, an instru-

mentality of the Organization of American States, alleging that the United States imposed the death penalty in a racially discriminatory manner. The various studies submitted to the Commission revealed a broad pattern of racially-based disparities in death sentencing based on the race of the victim. The evidence established that a person convicted in the State of Florida of murdering a white person was ten times more likely to receive the death penalty than one convicted of murdering a black person.[1] In Texas, the ratio was eighteen to one.[2] In Georgia, where this litigation arose, it was twelve to one.[3]

The Law Group argued that domestic remedies for the redress of this discrimination were effectively exhausted when this Court denied *certiorari* in *Spinkelink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 404 U.S. 976 (1979).

The United States opposed the petition almost exclusively on the ground that domestic remedies had not been exhausted with the denial of *certiorari* in *Spinkelink*. It stressed that U.S. courts including this Court remained open to receive evidence demonstrating the fact and extent of discrimination. Indeed, the government of the United States in framing the issue expressly conceded its relevance and importance:

> The Petition filed by the International Human Rights Law Group on behalf of all prisoners currently awaiting execution in the states of Florida, Georgia, and Texas raises an important issue in the administration of jus-

[1]The data are described in the affidavit of Professor William J. Bowers, which was attached to the Law Group's 1980 petition, and which is attached hereto as Appendix A. *See also*, Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

[2]App. A at 4a.

[3]Id. at 3a.

> tice in the United States—whether capital punishment statutes determined by the U.S. Supreme Court to be constitutionally valid on their face are being implemented in a constitutional manner.

Opposition of the United States, Case 7465 (June 16, 1981) at ¶ 1. The United States repeated its assurance to the Commission that U.S. courts would respond fully and fairly to evidence establishing race discrimination. In light of this suggestion and on other procedural grounds, the Commission denied the petition on October 3, 1984, noting that the statistical evidence submitted was more appropriately directed to a domestic court in each individual case.

As a result, the propriety of review in this particular capital case is patent. At the threshold of course the petitioner's sentence of death inherently deserves this Court's most searching review.

> Because sentences of death are "qualitatively different" from prison sentences, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

Eddings v. Oklahoma, 455 U.S. 104, 117-118 (1982) (O'Connor, J., concurring). But even ignoring its unique evidentiary record,[4] the case raises an issue which the United States

---

[4]The statistical study submitted to the courts below "is based on the most comprehensive empirical record of racial patterns in the imposition of the death penalty that has ever been developed in this country, or that is likely to be developed in the foreseeable future." Gross, *Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing*, forthcoming in 18 UNIV.

government itself apparently regards as fundamentally important and unresolved, *i.e.* whether discrimination in capital sentencing, as established by statistical proof, is constitutional. Pet. App. 43-50.

II. The Eleventh Circuit Was Required To Construe The Georgia Death Penalty Statute Consistently With Pertinent International Law And Failed To Do So. The Existence Of State-Sanctioned Racial Discrimination As Acknowledged By The Eleventh Circuit Violates A Peremptory Norm Of International Law.

It is axiomatic that international law is part of the law of the United States and, under the Supremacy Clause of the Constitution as interpreted, "must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900). This basic principle has been accepted from the earliest days of the Republic, *Ware v. Hylton*, 3 U.S. (3 Da.) 199, 281 (1796); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815), and received fresh confirmation from this Court as recently as 1983 in Justice O'Connor's opinion for the Court in *First National City Bank v. Banco Para el Commercio Exterior de Cuba*, 103 S.Ct. 2591, 2598 (1983).[5]

CAL. DAVIS L. R., No. 4 (1985) (at page 1 of prepublication manuscript). Though acknowledging the validity of the study, the *en banc* court was sharply divided on the issue of what conclusions of law could be drawn from it, *compare* 753 F.2d at 886 *with* 753 F.2d at 907 (Johnson, Hatchett, and Clark, JJ., dissenting). The dispute independently suggests the propriety of this Court's review in light of Justice Blackmun's opinion for the Court in both *Castaneda v. Partida*, 430 U.S. 482 (1976) and *Rose v. Mitchell*, 443 U.S. 545 (1978).

[5] *See also* Op. Att'y Gen. 27 (1972) ("The law of nations, although not specially adopted by the Constitution or any municipal act, is essentially a part of the law of the land"); *Restatement (Revised) of the Foreign Relations Law of the United States* (Tentative Draft No. 1, 1980) at § 131, Comment D ("the proposition that international law

The most fundamental application of this principle arises when courts are requested to interpret statutes enacted by Congress or the state legislatures. In all such cases, the statute "ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." *Weinberger v. Rossi*, 456 U.S. 25, 33 (1982), *quoting Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *See also, Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801); *Cook v. United States*, 288 U.S. 102 (1983); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). The "law of nations" which the courts are directed to apply includes both treaties and customary international law.[6]

Thus, in construing the Georgia death penalty statute and petitioner's sentence thereunder, the Eleventh Circuit Court of Appeals was obliged to "ascertain[ ] and administer[ ]" international law, insofar as "questions of right" depend upon it, *The Paquete Habana*, *supra*. On such

---

and agreements are law in the United States is addressed mainly to the courts. They are to apply international law or agreements as if their provisions were enacted by Congress."); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1560 (1984).

[6]Customary international law is essentially international common law, which arises out of the practice of nations acting in a particular manner because they feel themselves legally bound to do so. This state practice may be deduced from treaties, national constitutions, declarations and resolutions of intergovernmental bodies, public pronouncements by heads of state, and empirical evidence of the extent to which the customary law rule is observed. *See North Sea Continental Shelf Cases*, [1969] I.C.J. Rep. 37. Customary international law is binding on all nations and creates enforceable rights and obligations for individuals. *Paquete Habana*, *supra*; *Respublica v. DeLongchamps*, 1 U.S. 119, 1 Dall. 111 (O.&T. Pa. 1784). *See e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom, Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

grounds, this Court struck down a discriminatory ordinance which was inconsistent with the provisions of an international treaty in *Asakura v. Seattle*, 265 U.S. 332 (1923):

> The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.

Id. at 341 (citations omitted).

The anti-discrimination norm of international law is no less binding than that applied in *Asakura*. Indeed, under any standard of proof, the right to be free from governmental discrimination on the basis of race is so universally accepted by nations as to constitute a peremptory norm of international law.[7] It is included in such fundamental texts as the Charter of the United Nations,[8] and the Charter of the Organization of American States[9], both of which are

---

[7]A peremptory norm of international law is a "norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, *entered into force* Jan. 27, 1980. Although the Vienna Convention has been signed but not ratified by the United States, the Department of State, in submitting the convention to the Senate, stated that the convention "is already recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st Sess. (1971) at 1.

[8]U.N. Charter, *signed* June 26, 1945, *entered into force* October 24, 1945, 59 Stat. 1031, T.S. No. 993, Article 55(c).

[9]OAS Charter, *signed* April 30, 1948, *entered into force* December 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361, Article 3(j).

treaties ratified by the United States. Similar prohibitions are found in every comprehensive international treaty pertaining to human rights and in numerous international declarations and resolutions.[10] Recognizing this consistent and universal condemnation of racial discrimination, the International Court of Justice has concluded that "the principles and rules concerning the basic rights of the human person, including protection from . . . racial discrimination," constitute an international obligation of all states. *Case concerning the Barcelona Traction Light and Power Co., Ltd.*, [1970] I.C.J. Rep. 32. *See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, [1971] I.C.J. Rep. 57:

> [T]o establish . . . and to enforce distinctions, exclusions, restrictions, and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin . . . constitutes a denial of fundamental human rights [and] is a flagrant violation of the purposes and principles of the charter.

With remarkable candor, the *en banc* Court of Appeals accepted the factual findings of petitioner's studies, *viz.* that no factors other than race could account for the marked increase in capital sentences among those defendants whose victims were white. Indeed, the court below expressly "assum[ed] the validity of the research," and "that it proves what it claims to prove." 753 F.2d at 886. The court's decision as a matter of law that this evidence established no violation of the Eighth and Fourteenth Amendments to the U.S. Constitution does not dispose of the issue whether it evinces a fundamental violation of international law. The court of

---

[10] The relevant international authorities are collected in Appendix B.

appeals cannot so blithly ignore the legal consequences of its factual concessions.

The discrepancy in capital sentencing patterns which is assumed by the *en banc* court in this case clearly falls within the international prohibition. That norm, apparently unlike the Eighth and Fourteenth Amendments in the Eleventh Circuit, admits no defense of degree and demands no incontrovertible showing of individualized intent. It is systematic racial discrimination, of the kind admittedly demonstrated in this case, which violates binding international law.[11]

But the *en banc* court below made no attempt to discharge its burden under *The Paquete Habana* and *Asakura* to apply international law. It utterly failed to address the relevant norms of international law that constitute part of federal common law. The court simply did not discuss whether the racial discrimination alleged by petitioner falls within the scope of international law as incorporated into federal common law. Instead, on the issue of discrimination, the court of appeals contented itself with considering only the contours of the Eighth and Fourteenth Amendments. The court's apparent neglect of the peremptory norm of international law prohibiting racial discrimination cannot be squared with this Court's consistent adherence to the law of nations as providing the rule of decision, whenever a litigant's rights are framed in its terms. In short, the *en banc* court's failure to assess the international law issues raised by its assumption that the showing of discrimination was valid constitutes error which should be reviewed by this Court. And, if the *en banc* court somehow did *not* err in failing to ascertain and apply international law, then the

---

[11] *See e.g.* American Law Institute, *Restatement of Foreign Relations Law of the United States (Revised)*, § 702(f) (Tent. Draft No. 6 1985).

case raises the fundamental issue of when, under *The Paquete Habana* and *Asakura*, domestic courts are obliged to look to that source of law and when they may ignore it.

CONCLUSION

The decision of the Court of Appeals *en banc* that the Georgia death penalty statute is not unlawfully applied in spite of an admitted discriminatory impact flies in the face of the universal principle that international human rights law applies to all individuals. The *en banc* court's failure to consider in a meaningful way the international law issues relevant to this case violates the Supremacy Clause of the Constitution as interpreted and ignores the decisions of this Court which establish the fundamental role of international law in United States law. In addition, even if the *en banc* court's disposition were consistent with Supreme Court precedent in the international law field, the case raises issues of law and fact which sharply distinguish it from other capital cases, as the United States itself has acknowledged.

For these reasons, *amicus* respectfully urges this Court to grant *certiorari*.

Respectfully submitted,

RALPH G. STEINHARDT, ESQ.
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6055

Counsel of Record
for *Amicus Curiae*

Of Counsel:

Hurst Hannum, Esq.
Amy Young, Esq.
Steven M. Schneebaum, Esq.